INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Arlington Discount Co., 408 F. 2d 490	7
Caplan v. *Anderson*, 256 F. 2d 416	2
Caplan v. *Anderson*, 259 F. 2d 283	2
Detroit International Bridge Co., 111 F. 2d 235	7
Finn v. *Childs*, 181 F. 2d 431	7, 8
General Economics Comp., 360 F. 2d 762	8
Imperial '400' National, Inc., 432 F. 2d 232	7, 8
Massachusetts Mutual Life Insurance Co. v. *Brock*, 405 F. 2d 429, *certiorari denied*, 395 U.S. 906	7
Nazareth Fair Grounds and Farmers Market, Inc., 374 F. 2d 595	7
Official Creditors' Committee of Fox Markets, Inc. v. *Ely*, 337 F. 2d 461	7
Protective Committee v. *Anderson*, 364 F. 2d 936, reversed, 390 U.S. 414	3
Protective Committee v. *Anderson*, 390 U.S. 414	1, 3, 6
Protective Committee v. *Kirkland*, 434 F. 2d 804	1, 3

420-449—71

Cases—Continued

	Page
Reconstruction Finance Corporation v. *Prudence Securities Advisory Group*, 311 U.S. 579	6
Scribner & Miller v. *Conway*, 238 F. 2d 905	7
Solar Manufacturing Corp., 215 F. 2d 555	7
TMT Trailer Ferry, Inc., 334 F. 2d 118	2, 3
TMT Trailer Ferry, Inc. v. *Anderson*, 292 F. 2d 455, *certiorari denied sub nom. Shaffer* v. *Anderson*, 368 U.S. 956	2
Travelers Indemnity Company v. *Anderson*, 394 F. 2d 929	3
United States v. *Anderson*, 334 F. 2d 111, *certiorari denied*, 379 U.S. 879	2
Wolff v. *Weinstein*, 372 U.S. 633	9
Woods v. *City Bank Co.*, 312 U.S. 262	9

Statutes:

Chapter X of the Bankruptcy Act (11 U.S.C. 501 *et seq.*):	
Section 208 (11 U.S.C. 608)	1, 8
Section 242 (11 U.S.C. 642)	8
Section 249 (11 U.S.C. 649)	9
Section 250 (11 U.S.C. 650)	5

Miscellaneous:

9 Moore, *Federal Practice* 1213 (2d ed., 1970)	6

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1385

IN THE MATTER OF TMT TRAILER FERRY, INC., ET AL., THOMAS J. KIRKLAND, TRUSTEE, PETITIONER

v.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A63–A69) is reported at 434 F. 2d 804. The opinion of the district court (Pet. App. A13–A17) is unreported.

* The Securities and Exchange Commission has been participating actively and continuously in the reorganization proceeding in the district court as a party pursuant to Section 208 of Chapter X of the Bankruptcy Act, 11 U.S.C. 608, since shortly after the commencement of the proceeding in 1957, and has taken positions in that court and in the court of appeals similar to the positions urged herein. As in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420 n. 3, the Commission is "an unnamed respondent before this Court."

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1970 (Pet. App. A72), and a petition for rehearing was denied on December 21, 1970 (Pet. App. A71). The petition for a writ of certiorari was filed on February 24, 1971. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c) and 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the court of appeals erred by increasing the district court's award of a partial interim allowance to attorneys for a Stockholders' Protective Committee from $10,000 to $60,000.

2. Whether the court of appeals properly held that the district judge should have issued a protective order against the taking of depositions of Committee members and counsel regarding the request for the interim allowance "to prevent undue harassment" (Pet. App. A68), and should have given instructions concerning subsequent participation by the Committee and counsel in the proceeding.

STATEMENT

Petitioner is the successor trustee of the estate of TMT Trailer Ferry, Inc., a debtor which has been in reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. 501, *et seq.*, since 1957. Various aspects of this proceeding have been before the court of appeals [1] and

[1] *Caplan* v. *Anderson*, 256 F. 2d 416 (C.A. 5); *Caplan* v. *Anderson*, 259 F. 2d 283 (C.A. 5); *TMT Trailer Ferry, Inc.* v. *Anderson*, 292 F. 2d 455 (C.A. 5), *certiorari denied sub nom. Shaffer* v. *Anderson*, 368 U.S. 956; *United States* v. *Anderson*, 334 F. 2d 111 (C.A. 5); *certiorari denied*, 379 U.S. 879; *In re TMT Trailer*

this Court. In *Protective Committee* v. *Anderson,* 390 U.S. 414, this Court reversed the confirmation of a plan of reorganization which would have excluded the debtor's stockholders from any further participation or interest in the reorganized company. It held that the company had been valued on an incorrect basis and that certain compromises of major claims had been improper because no hearings had ever been held on the claims or on objections to them which had been made by the Committee, the Commission and others. Accordingly, the Court remanded the proceeding to the court of appeals with directions to remand to the district court to determine the proper valuation of the debtor (*id.* at 453) and whether and on what terms the major claims might be compromised (*id.* at 441).

Upon remand the attorneys for the Stockholders Protective Committee applied in the district court for an interim allowance of counsel fees ($100,000 for services rendered from 1957 through June 30, 1968) and reimbursement of expenses ($22,100.91 for the period from 1957 through December 23, 1968) (Ct. Ap. App. 121, 127, 129, 159, 245).[2] Committee counsel had not theretofore received any compensation or reimbursement of expenses. The application stated that the three committee counsel had devoted more than 8,000 hours to the reorganization proceeding and that extensive

---

Ferry, Inc., 334 F. 2d 118 (C.A. 5); *Protective Committee* v. *Anderson*, 364 F. 2d 936, (C.A. 5), reversed, 390 U.S. 414; *Travelers Indemnity Company* v. *Anderson*, 394 F. 2d 929 (C.A. 5); *Protective Committee* v. *Kirkland*, 434 F. 2d 804 (C.A. 5).

[2] "Ct. Ap. App." refers to the appendix filed in the court of appeals.

future services were contemplated (Ct. Ap. App. 159, 192). The application was supported by the Commission and opposed by the then trustee and most major creditors (Ct. Ap. App. 192, 212, 146, 199, 152, 157, 197, 206, 211).

Following a hearing on the application, at which the attorneys for several creditors, the Commission and the then attorney for the then trustee cross-examined two of the applicants (Ct. Ap. App. 793, 617), the district court found "exceptional circumstances" to justify the granting of the interim allowance and requested the Commission "to file a memorandum giving its views on what amount should be awarded to counsel" (Ct. Ap. App. 637–638). The Commission recommended an award of $60,000 in fees and $10,000 as reimbursement of expenses (Ct. Ap. App. 263).

Shortly after the hearing the trustee and his attorney resigned and a new trustee and counsel were appointed (Ct. Ap. App. 249, 260). Several months later the successor trustee filed a report alleging, *inter alia,* that the Committee and its counsel had been involved in a conflict of interest in their attempt to gain creditor treatment for allegedly defrauded stockholders; that the Committee had exceeded its authority in opposing as unfair and in appealing from the confirmation of plans which excluded stockholders from participating in the reorganized company; and that one of the Committee counsel was not properly designated as an attorney in the proceeding (Ct. Ap. App. 271).

The district court then entered an *ex parte* order postponing any award of compensation to committee counsel and authorizing further investigation of matters raised

in the report (Ct. Ap. App. 761). The trustee thereafter noticed the taking of depositions in Miami, Florida, of the members of the Committee and Committee counsel, most of whom lived at substantial distances (Ct. Ap. App. 367).[3] The trustee also announced that counsel for the Committee should not expect to be compensated from the estate as to future participation in the proceeding (Ct. Ap. App. 387–388). The Committee, supported by the Commission, moved for a protective order against the taking of the depositions and for instructions as to its future participation (Ct. Ap. App. 397, 431).

In October 1969, fourteen months after Committee counsel had applied for the interim allowance, the district court entered an order awarding $10,000 for services rendered and $5,000 reimbursement of expenses incurred during the first eleven years of the proceeding (Pet. App. A13). The same order denied the Committee's requests for a protective order and instructions and reserved jurisdiction to "amend, modify, alter or strike" the award at any future time (Pet. App. A15).

The Committee and its counsel obtained leave, pursuant to Section 250 of Chapter X, 11 U.S.C. 650, to appeal from those portions of the order regarding the award of compensation and reimbursement (Pet. App. A51).[4] They appealed as of right from those provisions

[3] Committee members reside in California and New York. Committee counsel live in West Palm Beach, Florida, and Washington, D.C.

[4] The court of appeals denied leave to appeal the other parts of the order under section 250 (Pet. App. A–53).

denying the protective order and instructions (Pet. App. A50).[5]

The court of appeals consolidated the two appeals. It reversed the district court, holding: (1) that Committee counsel were to be awarded $60,000 interim compensation for services rendered and $10,000 reimbursement of expenses and (2) that the district court should have granted the Committee's requests for a protective order and instructions as to its future participation in the proceeding.

ARGUMENT

The decision of the court of appeals was correct and presents no issue warranting review by this Court.

1. The Committee, which represents the interests of thousands of small, widely scattered stockholders, has performed its role in this lengthy proceeding effectively, as this Court is aware. See *Protective Committee* v. *Anderson,* 390 U.S. 414. Committee counsel have labored nearly 14 years without receiving any compensation or reimbursement of expenses. They have benefited the estate, as both courts below recognized (Pet. App. A16, A67). They should, therefore, be given adequate interim compensation "to prevent undue hardship" (Pet. App. A67) and to insure that they will be able to continue to render beneficial services in the proceeding.

---

[5] The petition advances, for the first time, the contention that the appeal was untimely (Pet. 4, 24). We understand that the Committee, in its brief in opposition, will discuss this question. In any event, it is not questioned that the petition for leave to appeal was timely filed, so any defect would not appear to have been jurisdictional. 9 Moore, *Federal Practice* 1213 (2d ed., 1970). Cf., *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* 311 U.S. 579.

There is no conflict among the circuits, as petitioner contends (Pet. 24), as to whether a court of appeals, when it disagrees with an award of fees made by the district court, can increase or decrease the award itself. Although the courts of appeals frequently do remand cases to the district court for determination of reasonable fees, the fixing of fees by the courts of appeals themselves is not uncommon,[6] particularly where substantial amounts of the services have been performed before them.[7] In the circumstances of this case, the court of appeals properly concluded that the use of its "own independent judgment" was warranted (Pet. App. A66).

The court of appeals has had extensive experience with this proceeding, numerous aspects of which have

---

[6] See, *e.g.*, *In re Arlington Discount Co.*, 408 F. 2d 490, 491 (C.A. 6); *In the Matter of Nazareth Fair Grounds and Farmers Market Inc.*, 374 F. 2d 595, 598 (C.A. 2); *Official Creditors' Committee of Fox Markets, Inc.* v. *Ely*, 337 F. 2d 461, 470–471 (C.A. 9); *Scribner & Miller* v. *Conway*, 238 F. 2d 905, 907 (C.A. 2); *In re Solar Manufacturing Corp.*, 215 F. 2d 555 (C.A. 3); *In re Detroit International Bridge Co.*, 111 F. 2d 235 (C.A. 6). Occasionally, instead of fixing a specific fee at the appellate level, a court of appeals remands to the district court for further proceedings but requires that the fee not exceed a maximum specified limitation. See, *e.g.*, *In re Imperial '400' National, Inc.*, 432 F. 2d 232, 240 (C.A. 3); *Massachusetts Mutual Life Insurance Co.* v. *Brock*, 405 F. 2d 429, 435 (C.A. 5), *certiorari denied*, 395 U.S. 906; cf., *Finn* v. *Childs*, 181 F. 2d 431 (C.A. 2).

[7] *E.g.*, *In re Solar Manufacturing Corp.*, *supra*, 215 F. 2d at 561; *In the Matter of Nazareth Fair Grounds and Farmers Market, Inc.*, *supra*, 374 F. 2d at 597.

been before it on appeal (see n. 1, *supra*).[8] The court accepted the "fair and reasonable" (Pet. App. A66, 67) recommendation of this Commission, which, it noted, had participated fully in the proceeding from its inception and was "intimately familiar with the services rendered by the Committee's counsel over a long period of years" (*ibid.*).[9]

2. The court of appeals correctly ruled that the district court should have issued a protective order against the taking of depositions on the issue of the interim award "to prevent undue harassment" (Pet. App. A68). As the court noted, "[a] full hearing had already been held on the issue" (*ibid.*). There is nothing in the opinion, moreover, which suggests that the district court cannot reexamine the award if evidence of mis-

[8] By contrast, the present district judge was assigned to this case only after the remand by this Court in 1968, subsequent to the period for which the allowance was requested. Similarly, the trustee and his counsel, both of whom were appointed by the present district judge, had no connection with the proceeding during that period.

[9] When the Commission enters a corporate reorganization proceeding under Chapter X, it becomes a party with the rights of any other party, except that it may not appeal and its attorneys may not receive fees. 11 U.S.C. 608, 642. The Commission usually makes recommendations with regard to fees, which are, of course, advisory only. But since the Commission is the only party to the proceeding with no financial interest in the outcome, some courts have given substantial weight to the Commission's recommendations. See, *e.g.*, *In re Imperial '400' National, Inc.*, *supra*, 432 F. 2d at 240; *Finn* v. *Childs*, *supra*, 181 F. 2d at 438; *In re General Economics Corp.*, 360 F. 2d 762, 765 (C.A. 2).

conduct or conflict of interest by the Committee, warranting disqualification of any fee, is produced.[10]

The court also correctly held that the district court "was in error in denying the Committee's motion for instructions defining [its] role" in future proceedings. The new trustee's counsel had made repeated statements that efforts by the Committee in important aspects of the reorganization proceeding that had been ordered by this Court, 390 U.S. 414, 453, would not be compensable (Ct. Ap. App. 369, 387–388). It was thus necessary to make it clear that the Committee was "entitled to participate fully in these proceedings, and if its services result in some benefit to the estate, compensation for those services is authorized" (Pet. App. A68).

---

[10] The Commission did not, as petitioner contends (Pet. 25, n. 31), take the position before the court of appeals that the only possible legal disqualification is that set forth in Section 249 of the Bankruptcy Act, 11 U.S.C. 649. Commission counsel pointed out in argument that any legal disqualification may be a ground for forfeiture. And the Commission's brief in the court of appeals (No. 29089) stated (p. 25): "Any allowance now awarded should be immune from later reduction or vacation unless evidence should demonstrate at a later time legal reasons for forfeiture of the allowance, such as, for example, conflict of interest (*e.g.*, *Woods* v. *City Bank Co.*, 312 U.S. 262 (1941)) or trading in securities of the debtor in violation of Section 249 of Chapter X (*e.g.*, *Wolff* v. *Weinstein*, 372 U.S. 633 (1963))."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel,

DAVID FERBER,
Solicitor,

PAUL GONSON,
Assistant General Counsel,

ROBERT E. GINSBERG,
Attorney,
Securities and Exchange Commission.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971